SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 367

LYKES BROS. STEAMSHIP CO., INC.,
Petitioner,

versus

HESS SHIPPING CORPORATION,
Respondent.

RESPONDENT'S REPLY BRIEF TO REPLY BRIEF OF PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Y IT PLEASE THE COURT:

1. Petitioner's Opening Statements Answered

Petitioner has filed a brief in reply to Respond- s reply to Petitioner's application for certiorari. s brief is in reply to Petitioner's reply. Nothing or different has been added by Petitioner's reply; identical propositions were raised and argued in District Court, in the Court of Appeals at the first ring, in the Court of Appeals at the en banc re- ring and in the Petition for Certiorari.

Petitioner again points to the language used by Judge Brown in his dissenting opinion to the effect that "Rule 16 is dead in the Fifth Circuit". That is not the case. The law in the Fifth Circuit is the same as it has always been. Before Judge Brown took the bench, the Fifth Circuit specifically held that in circumstances nearly identical to those here involved, Judge Brown's so-called "mandatory imperatives" of Article 16 should not be mechanically and blindly applied in every instance. The facts in the case of *The Standella*, 108 F. 2d 619 (5th Cir. 1939) are remarkably similar to the facts in this case, i.e. the collision occurred in fog with visibility limited to 300 feet, the collision occurred in the Houston-Galveston Ship Channel which had a bottom width of 400 feet, a surface width of 450 feet, a depth of 34 feet, the depth of the water outside the channel was only six feet, the vessels were meeting head to head and the collision occurred on the east side of the channel. The Court rejected the argument of Judge Brown, who, at that time was an advocate for the appellant, that the requirement to stop engines must be complied with, regardless of the attending circumstances. Said the Court:

> "From all the evidence it clearly appears that the collision occurred on the east side of the channel; that the M V Standella was negligently navigating on her port side of the channel; and that had she kept to the west (her starboard) side the collision would not have occurred.
>
> The M V Standella was guilty of a most serious statutory fault when she navigated on the

port side of the fairway or mid-channel. Section 210, 33 U.S.C.A., provides: 'Steam vessel in narrow channel. Art. 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.' This is a cardinal rule of navigation and applies as well in fog as in clear weather. The most ignorant navigator will be presumed to know this simple and wise requirement. The Yarmouth, D.C., 100 F. 667; The Newport News, 4 Cir., 105 F. 389, 393.

The M/V Standella claims fault against the Andrew for failing to stop her engine and cites Article 16, 33, U.S.C.A: Sec. 192, which provides: 'Speed in fog, etc. * * * A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.'

The evidence is in sharp conflict as to whether or not the M/V Standella was sounding a fog signal prior to the collision. It is without dispute that the Andrew failed to stop or reverse her engine, and that at the time of the disaster she was moving at a speed of about two or two and one-half miles per hour. It is clearly shown, however, that the failure of the Andrew to stop or reverse her engine did not cause the acci-

> dent. Her failure to stop in no wise contributed to the collision. The M/V Standella was moving out to sea on the wrong side of the channel. Had the Andrew stopped her engine she would have been in the path of the oncoming M/V Standella and the collision would have in all probability been more serious than it was. The liability for damages is upon the ship or ships whose fault caused the injury, and where, as here, the fault of one vessel could have had nothing to do with the collision that fault may be dismissed from consideration."

Petitioner's version of the factual events leading to the collision were unacceptable to the trial court and have twice since been denied by the Court of Appeals. Nevertheless, Petitioner continues to re-argue the facts and we again respond to the argument.

The trial court and the majority opinion of the Court of Appeals both held that under the existing circumstances the Voyager's speed was moderate; that the stopping of engines was not required by the rule because the position of the Charles Lykes was known and further, that the stopping of the Voyager's engines would probably have thrown her out of control. We think the circumstances fully justified these findings and conclusions. In addition to these findings and conclusions, the Court specifically found that "The Charles Lykes would have collided with her (the Voyager) even if she had been dead in the water".

On the contrary, it is equally clear that the stopping of engines in the Mobile Ship Channel (in reality, a

canal), just as in the case of a further reduction in speed, would in all probability have resulted in a more serious collision. To hold otherwise would be tantamount to condemning the pilot of the Hess Voyager for doing that which greatly diminished the consequences of an otherwise inescapable collision and such an interpretation of the rule would have an effect exactly the opposite of that intended to be accomplished by the enactment of the Inland Rules. See the *Gertrude Parker*, 178 F.2d 259 (1st Cir. 1949).

2. There is No Conflict Between the Case at Bar and the Goldshell-White Plains

Petitioner reiterates its previous claim of conflict between the decision here and that of the *Goldshell-White Plains*, 224 F. 2d 86, 1955 AMC 1438 but now admits that the collision in the Goldshell-White Plains did not take place in a narrow channel. Petitioner's claim that "it cannot be urged that an *immoderate speed* is made acceptable by the narrowness of the waterway" is completely irrelevant. First of all, both courts have found that the Hess Voyager's speed *was moderate*; secondly, both courts have established that the speed or movement through the water of the Hess Voyager did not and could not have in anywise contributed to the collision.

3. There is No Conflict Between the Case at Bar and Burgan-Bergechief

Petitioner continues to insist that there is a conflict between the decision in the case at bar and that of the Second Circuit decision in the case of the *Burgan-*

Bergechief, 274 F. 2d 469 AMC 1380. A comparison of the two cases will show that the factual situations were entirely different. Petitioner claims that the Burgan-Bergechief stands for the proposition that a radar observation does not constitute sufficient ascertainment of position under Article 16 and that the decision of the case at bar holds to the contrary. The essential factual differences in the two cases are as follows:

1. In the case at bar, the collision occurred in a very narrow, dredged channel in the inland waters of Mobile Bay; in the Burgan-Bergechief, the collision occurred in the open sea off the Coast of Maine.

2. In the instant case the position of the Charles Lykes was not only precisely fixed by radar but was acknowledged and confirmed by radio communications between the two vessels; in the Burgan-Bergechief the radar observation was not a continuous one, did not *precisely* fix the position of the observed vessel and was not acknowledged and confirmed by other means.

3. In the Burgan-Bergechief the vessels were not operating under the mandate of Article 25 of the Inland Rules.

It is submitted that Judge Medina's well-reasoned opinion in the Burgan-Bergechief does not even to the slightest degree conflict with the decision in the case at bar.

CONCLUSION

In summary, it is submitted that the Hess Voyager took the most prudent course available (and the only logical maneuver possible) by running completely out of the line buoys so as to expose as little of itself as possible to the on-coming Charles Lykes. It is apparent that the collision was indeed foredoomed and inevitable from the time the Charles Lykes made the turn into the Upper Reach of Mobile Ship Channel. The maneuvers of the Hess Voyager did not increase the risk of collision but on the contrary, prevented a much more serious casualty.

The long and short of appellant's attack on the Hess Voyager's speed is met head on by the lower courts finding that "it is apparent from all the evidence that the Hess Voyager was aground at the moment of collision and that the Charles Lykes would have collided with her even if she had been dead in the water."

We submit that the factual findings regarding proximate cause and negligence by the trial court and the Court of Appeals are overwhelmingly supported by the evidence and that the "circumstances" of this case justify the actions of the Hess Voyager under Article 16 or Article 27 or any of the other Rules of the Road.

Respectfully submitted,

ARMBRECHT, JACKSON & DeMOUY

By _____
THEODORE K. JACKSON

By _____
RAE M. CROWE

CERTIFICATE OF SERVICE

I Theodore K. Jackson, a member of the bar of thi Court, hereby certify that three copies of the abov and foregoing brief have been served on Petitioner' Counsel of Record, Benjamin W. Yancey, Esquire, b depositing same in the United States mail, postage pre paid, addressed to him at his office in New Orleans Louisiana on this _____ day of _____, 197

THEODORE K. JACKSON

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Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully moves this Honorable Court for an order vacating its denial of the petition for writ of certiorari (Mr. Justice Douglas and Mr. Justice Stewart dissenting), entered on October 12, 1970, and granting the petition. As grounds for this motion, petitioner states the following:

I.

The dire concern expressed by the United States Navy and the United States Coast Guard for this problem, as reflected in the article, "Gargantuan Tankers: Privileged or Burdened?", published in the September, 1970 issue of the U. S. Naval Institute Proceedings by Captain Edward F. Oliver of the United States Coast Guard, necessitates action by this Court. We are appending a copy of that article to this petition.

The issues raised by this petition and by the evenly divided decision of the United States Court of Appeals for the Fifth Circuit, *en banc*, are of the greatest urgency and failure to vacate and reverse the decision below inevitably fosters the prospect of a casualty of catastrophic proportions. As stated by Chief Judge Brown in his dissent below:

> "Considering the size of this vessel, one of the contemporary huge tankers of ever increasing size, to allow such speed, which does not even begin to pay even a deferential bow toward Rule 16, the Court's action is more than to write out Rule 16. It is to give judicial license to bigness, as though the ungainly, awkward nature of these floating boxes relieves them of compliance with any part of the rules except the qualifiers of 'special circumstances', 'existing circumstances', and the like. And, since on this Court's analysis S/T Hess Voyager could never safely navigate in channels or harbors at a speed less than 6 knots, it means that for her life, she need not pay heed to Rule 16 and its demand for moderate speed which, until today, has always meant capacity to stop in half the distance of visibility * * *."[1]

The immediacy of the threat and its importance to safety of navigation and pollution control is fully developed by Captain Oliver, who points out:

> "Following the *Torrey Canyon* debacle, the world began to understand that the potential damage from a collision or stranding of a multimillion-barrel oil tanker was not acceptable. The Santa Barbara Channel disaster, for example, where 241,000 gallons (7,650 barrels) escaped from a broken casing, would be insignificant compared to a similar accident involving a tanker that could carry 3,000,000 barrels."[2]

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[1] 417 F. (2d) 346, 352.

[2] "Gargantuan Tankers: Privileged or Burdened?", U. S. Naval Institute Proceedings, September, 1970, p. 40, appended hereto.

The HESS VOYAGER has a gross tonnage of 27,015 tons as compared to a 10,000 gross ton T-2 tanker of World War II vintage. Her deadweight tonnage would be approximately 44,000 tons, the standard used in the vessel descriptions in the article by Captain Oliver. This converts to a capacity of approximately 230,000 barrels and a casualty involving a vessel of this size in an area such as the Mobile Bay Ship Channel can be compared readily to the 7,630 barrel discharge which caused the Santa Barbara disaster.

The Naval Institute article is directed toward obtaining inter-governmental regulation of such tankers to permit safety of navigation at sea, on international waters. It is inconceivable that while such efforts are being undertaken to avoid the danger of oil discharges on the open sea, our courts are granting free license to the plainly hazardous navigation of such vessels in our inland waters with its attendant risk of disaster. As concluded by Captain Oliver:

> "... In the final analysis, the intelligent control of speed in congested waters and low visibility is the only sound policy, and that will be ineffective unless sufficient astern power is built into the monster tankers."[1]

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[1] *Id.*, p. 44. As the article states, p. 41: "The extreme draft of the monster tankers has one compensating feature. Because of the limited maneuvering capabilities of these ships and the distance required for them to stop, their draft precludes navigation in congested and restricted inland waters. Since collision statistics show that only 9% of collisions occur in open waters, this factor may indicate an excellent potential safety record."

The HESS VOYAGER falls within the most dangerous category of all, a "mini-monster" with a draft enabling her to enter our ports combined with size and handling characteristics which preclude her safe operation.

The Fifth Circuit has answered the question posed by Captain Oliver because, under its decision, a gargantuan tanker plainly is a privileged vessel, is free to operate in the inland waters of the United States in a manifestly dangerous manner and is fully exempt from being held even partially at fault either because of its improper navigation or its improper construction.

We submit that this is a question of such importance that this Court must recognize the very unique situation applying here under which the Fifth Circuit, being evenly divided, *en banc*, has been unable to resolve, properly, this basic and essential problem, and should grant a writ of certiorari, reversing the decision below.

Respectfully submitted,

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CERTIFICATE

I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

BENJAMIN W. YANCEY

CERTIFICATE OF SERVICE

I, Benjamin W. Yancey, a member of the bar of this Court, do hereby certify that I have this day served a copy of the above and foregoing petition for rehearing on respondents' counsel of record, T. K. Jackson, Esq., by mailing a copy thereof, postage prepaid, to him at his office at Mobile, Alabama, on this ____ day of November, 1970.

BENJAMIN W. YANCEY